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In the Supreme Court

of the

United States

October Term 1972

No. 72-1643

CONTINENTAL CASUALTY COMPANY, an Illinois Corporation,

Petitioner,

vs.

J. G. LINK & COMPANY, a Co-Partnership of J. G. LINK and ELMER F. LINK, WAYRYNEN FUNERAL HOME, INC., a Montana Corporation, and RAY WAYRYNEN and MRS. RAY WAYRYNEN,

Respondents.

PETITIONER'S REPLY BRIEF

ARGUMENT

The Respondents maintain in their Answer Brief that the Court of Appeals properly did not consider

the breach of cooperation defense because the defense was not pleaded. The Court of Appeals, however, did not so adjudge; merely, it refused to even consider or rule upon the issue presented.

The failure of J. G. Link to cooperate on October 6, 1967, as it developed during the course of trial, was and is a proper basis for sustaining the District Court judgment because this breach was introduced into evidence through evidence introduced by the Respondents (Tr., p. 194, l. 20 - p. 195, l. 5; p. 269, l. 5-14) and through evidence introduced without objection through examination of Petitioner's witnesses (Tr., p. 202, l. 24 - p. 204, l. 20; p. 208, l. 9 - p. 211, l. 12; p. 254, l. 1 - p. 255, l. 9).

The District Court's ruling at the trial (that cooperation of the insured was not at issue) was after evidence of the failure to cooperate on October 6, 1967, had already been introduced, and the ruling related only to pre-October 6, 1967, lack of cooperation (Tr., p. 279, l. 15 - p. 280, l. 20. Compare Tr., p. 269, l. 5 - l. 14).

Rule 15 (b), of the Federal Rules of Civil Procedure, provides that when issues not raised by the pleadings are tried by implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings and the pleadings may be amended accordingly **even after judgment,** and "* * * failure so to amend does not affect the result of the trial of these issues." It is uniformally held by the various Courts of Appeals that this rule ap-

plies to affirmative defenses as well.[1] Consent to try affirmative defense issues not raised by the answer is implied by a plaintiff introducing evidence on the subject, or where evidence on the subject is introduced by the defendant without objection by the plaintiff.[2] Rule 15 (b) is not permissive in terms as it provides that issues tried by implied consent **shall** be treated as if raised in the pleadings.[3] Accordingly, under the circumstances of this case, it was not necessary to affirmatively plead the breach of the cooperation condition of the insurance policy.

Respectfully submitted,

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[1] 3 Moore's Federal Practice, § 15.13[2], page 987.
[2] Id, page 994.
[3] Id, page 996.